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BUTZER & CHEN LAW, LLC 870 HIGH STREET, SUITE 104 WORTHINGTON, OH 43085		HALE, GLORIA M		
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/090,889
Filing Date: March 04, 2002
Appellant(s): NOEL ET AL.

MAILED
JUL 13 2007
GROUP 3700

Dane Butzer
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 1-31-06 appealing from the Office action
mailed 5-4-04.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

2,723,396	Stack	11-1955
3,968,803	Hyman	07-1976

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stack (US 2,723,396) in view of Hyman (US 3,968,803).

Stack discloses a restraint 14 that reduces breast movement, is elastic at area 14 and is inelastic at areas 20 and the zipper tape 18. The zipper tape is a conventional zipper tape that is inelastic and of a woven material along the teeth of a zipper. The elastic and inelastic components hold in the wearer's breasts and thereby avoid movement. The Stack restraint fits about the wearer and inherently performs the method of use as broadly claimed.

However, the fastener, the zipper 18, of Stack, is not adjustable. Hyman discloses a chest restraint with an adjustable fastener, hook and loop material (30,32) as claimed to provide an adjustable fit on the wearer. (See Stack, figure 1 and cols. 1-

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2). Nothing precludes the Stack embodiment of figure 1 as being reversed with the fastener on the rear. The statement in the claims that it "is disposed to be positioned" is a broad statement wherein the Stack restraint is wearable in the rear as desired. (See Stack, figure 1 and cols 1-2 and Hyman, figures 1 and 2 and col. 4). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the restraint of Stack to include an adjustable hook and loop fastener in order to better fit the restraint on the wearer to provide the exact amount of tension about the breasts. The Stack restraint is sized as broadly claimed and Stack and Hyman disclose the strap as being wider at the tops of the breasts as claimed and it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the elastic of Stack which is of a single elastic material to structure it wider at the breast areas as disclosed by Hyman in order to better cover the breasts of the wearer. Nothing in Stack precludes it from being worn with a bra if a wearer desires. Stack incorporates a bra 30 as claimed and as seen in figure 3 of Stack. Stack discloses the embodiment of Figure 3 that is a bra that is wearable as a sports bra.

(10) Response to Argument

The Examiner strongly disagrees with the applicant's arguments on pages 7-12 of the Appeal Brief of 1-31-06 in regard to claim 1. It is the Examiner's position that the Stack and Hyman references clearly disclose and suggest the strap 14 of the figure 1 embodiment, as claimed. The Stack strap 14 of the figure 1 embodiment fits across the tops of the person's breasts as claimed since the strap extends over the entire breasts

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including the tops as broadly claimed. On page 7, lines 20-22 of the Brief, applicant is arguing more than what has been claimed. The present claim does not limit the strap to just the area across the tops of the wearer's breasts but claims any strap that will cover those areas. The strap of Stack is elastic as stated in col. 1, line 56 and also includes an inelastic portion 20 and zipper tape 18 which are well known to be woven non-elastic material. (See Stack, col. 1, line 50 – col. 2, line 9 and figure 1). The embodiment relied upon in applicant's argument on page 7, lines 23-26 of the Appeal Brief is an embodiment that is not relied upon in the final office action/rejection. The preset claims do not limit the strap to just the area across the tops of the wearer's breasts but claims any strap that will cover those area. The cup member is in a different embodiment. However, with or without the cup member the Stack device is broadly considered a strap. Applicant, on page 8, lines 1-2, is arguing more than what has been claimed and a different embodiment that was not relied upon. The strap of Stack is elastic and inelastic in that it includes the elastic area 14 and inelastic cover area 20 and inelastic supper tape 18 that does not stretch nor is elastic. The metes and bounds of the elasticity and inelasticity in the claim elements is extremely broad. One of ordinary skill in the art would know to use any elastic strap material as seen in Stack and a non elastic fastener to provide stability to the device for support on the wearer . The intended use does not limit the structure of the invention. However, Stack and Hyman clearly disclose the inherent use as being that which has been claimed. The Hyman reference has not been relied upon in the Final Rejection for the differences argued by appellant on page 8, lines 11-15. Hyman is only relied upon for the substitution of the

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zipper fastener of Stack with the adjustable fastener of Hyman in order to adjust the device on the wearer. Stack clearly discloses the elastic/inelastic qualities as discussed above. In regard to claim 19 as discussed on page 9 f the Appeal Brief, Stack and Hyman clearly disclose the strap restraint as claimed and as discussed above. Claim 19 also does not limit the strap as being only across the area of the tops of the breasts. The claim only requires that the strap fits across the breasts of which the Stack device of figure 1 embodiment does. Hyman discloses the adjustable fastener. The substitution of the Stack fastener 18 with the adjustable fastener of Hyman would have been an obvious modification of the Stack restraint to provide a better fit of the device on the wearer.

Again, applicant on page 11 is arguing more than what was claimed. The claim does not limit the strap as extending only over the breasts. Applicants claims also do not limit the strap as not covering the remainder of the breasts as argued. Nothing precludes the Stack/Hyman device from being used during exercise or athletic activity. The use as such is an Intended use statement and the Stack/Hyman device is usable as claimed. Additionally, the Stack/Hyman device inherently discloses the method steps as claimed. The Stack/Hyman device inherently discloses the method steps as claimed. The limitation of exercise can include walking, flexing and bending as broadly claimed of which the Stack/Hyman device can be worn during. Nothing precludes the Stack/Hyman device from being worn during such exercise or athletic activity wherein any movement about such as walking, bending or flexing, is considered to be exercise or athletic activity as broadly claimed. Additionally, applicant's specification only uses

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the same broad terminology of "sufficiently elastic and inelastic" and does not go into specific detail as to how the strap is structured more than what is generally known to be inelastic and elastic. Stack is also elastic and therefore is structured broadly to provide such elasticity since it assists the body in restraining movement. Any body movement at all is considered exercise in addition to just general movement. Applicant's specification does not specify specific "exercises" or types of movement. The Stack device restricts movement in the torso and does not limit to walking exercise or any other exercise. Stack performs the claimed methods of use since it restrains the torso of a wearer during movement as discussed above. Applicant has not disclosed or claimed any specific level of elasticity or inelasticity or any level, which is more or less than what is disclosed by Stack. The present claims do not claim the limited strap size which is placed only on the top edge of the breasts as shown in applicant's figures but rather claims a broad strap restraint as disclosed by Stack and Hyman.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



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